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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 413

UNITED STATES OF AMERICA, for the Use and Benefit of MILES LUMBER COMPANY, a Corporation,

and

MILES LUMBER COMPANY, a Missouri Corporation, in Its Individual Capacity,

Petitioners,

vs.

HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a Partnership or Joint Venture, Consisting of the Following Individuals, Partnerships, and Corporations:

Floyd Alfred Harrison, an Individual; Joe Bob Harrison, an Individual; Five Star Homes, Inc., an Oklahoma Corporation; Lake View Developers, Inc., an Oklahoma Corporation; Lorayne, Inc., an Oklahoma Corporation; Harrison Builders Supply Company, an Oklahoma Corporation; Merit Realty Company, an Oklahoma Corporation; Premium Realty Company, an Oklahoma Corporation; Floyd A. Harrison Realty Company, Inc., an Oklahoma Corporation; Country Club Developers, Inc., an Okahoma Corporation; W. R. Grimshaw Company, an Oklahoma Corporation; and W. R. Grimshaw Company, a Partnership Consisting of William Ray Grimshaw, William Ray Grimshaw, Jr., and Harry Douglas Grimshaw;

HARDY PLYWOOD AND DOOR, INC., a Corporation; TEXOMA DISTRIBUTORS, INC., a Corporation; MARSHALL WHOLESALE LUMBER COMPANY, INC., a Corporation; CARL MORRIS, an Individual Doing Business As Carl Morris Construction Company; STANDARD ACCIDENT INSURANCE COMPANY, a Corporation; NATIONAL SURETY CORPORATION, a Corporation; AETNA CASUALTY & SURETY COMPANY, a Corporation; NEW AMSTERDAM CASUALTY COMPANY, a Corporation; THE TRAVELERS INDEMNITY COMPANY, a Corporation; PAUL W. ANDERSON; NATHAN A. BURKHAM; W. G. (Bud) KILLION; MARJORIE ANDERSON; FLORINE BURKHAM; BETTY ANN KILLION; and DANIEL E. HARDY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray certiorari to review a judgment of the Court of Appeals for the 10th Circuit entered June 15, 1962.

OPINIONS BELOW.

On June 15, 1962, the United States Court of Appeals for the 10th Circuit entered its opinion written by Judge Breitenstein. A dissenting opinion was written by Judge Pickett. The appeal was from a judgment of dismissal of the United States District Court entered on October 10, 1961, dismissing the complaint and which also stated that an immediate appeal from the order and judgment should be had under 28 United States Code, § 1292. The United States Court of Appeals for the 10th Circuit had entered its order on November 3, 1961, granting leave to appeal from the portion of the order of the United States District Court which was interlocutory in character. The opinion and the dissent in the United States Court of Appeals for the 10th Circuit are reported in ____ F.2d ____ and are found in Appendix A of this Petition.

FEDERAL JURISDICTION.

The petitioner, United States of America for the Use and Benefit of Miles Lumber Company (a Missouri corporation), brought suit in the State of Kansas against a general contractor, Harrison and Grimshaw Construction

Company, various subcontractors and their sureties for materials and supplies shipped by Miles Lumber Company, a Missouri corporation, and delivered to a Capehart Housing Project at Fort Riley, Kansas. Suit was brought under the jurisdictional portion of the Miller Act, 40 United States Code, § 270. (49 Stat. 794, Aug. 24, 1935, Ch. 642)

JURISDICTION OF THE SUPREME COURT.

The judgment of the United States Court of Appeals was entered on June 15, 1962, affirming the judgment and order of the United States District Court. Jurisdiction of this Court is invoked under 28 United States Code, § 1254. (62 Stat. 928, June 25, 1948, Ch. 646)

SUMMARY OF THE MATTER INVOLVED.

Suit was brought by the United States of America on behalf of the Miles Lumber Company against a general contractor, Harrison and Grimshaw Construction Company, various subcontractors and their sureties for materials furnished by Miles Lumber Company and delivered to a Capehart Housing Project at Fort Riley, Kansas, in the year 1957. The suit was in six counts. Under Count I, suit was brought to recover the sum of $27,059.66 for materials furnished by Miles Lumber Company on the ground that the jurisdictional portion of the Miller Act, 40 United States Code, § 270 (b), [49 Stat. 794, Aug. 24, 1935, Ch. 642 (2)] applied. Suit was brought against the principal contractor Harrison and Grimshaw Construction Company (either a joint venture or a partnership) and its surety on a bond accepted by the United States under the Capehart Act. (69 Stat. 646, 70 Stat. 1019, 70 Stat. 1109, 12 U.S.C. § 1748, 42 U.S.C. 1594) A second set of defendants consisted of the immediate subcontractors to the contractor

and a third set of defendants consisted of individuals and firms who, it is alleged, were parties to the subcontracts and were themselves subcontractors. All of the defendants filed motions to dismiss or for summary judgment on the grounds that the Miller Act did not apply to housing projects constructed under the Capehart Act and that jurisdiction of suits brought on Capehart bonds could not be had under the Miller Act.

Counts II, III, IV, V, and VI were alternative counts to Count I and were suits brought by petitioner Miles Lumber Company in its individual capacity to recover the sum of $27,059.66 and jurisdiction was based upon diversity of citizenship. Motions were filed to dismiss these counts for want of proper venue and jurisdiction by defendants Paul Anderson, Marjorie Anderson and Daniel Hardy.

The United States District Court sustained the motion to dismiss Count I on the ground that the Miller Act did not apply and that jurisdiction of suits brought on Capehart bonds could not be had under the Miller Act. The lower court also sustained the Motions to dismiss Counts II, III, IV, V, and VI as to defendants Andersons and Hardy for the reason that since the Court had held that there was no jurisdiction under the Miller Act, there then could be no venue as to the three defendants under the remaining counts. Since venue and jurisdiction of Counts II, III, IV, V, and VI depend upon whether there is jurisdiction under the Miller Act, the determination of the question as to Count I determines whether the Court had erred with respect to the dismissal under Counts II, III, IV, V, and VI.

On appeal, the United States Court of Appeals for the 10th Circuit affirmed the holding of the United States District Court and held that the provisions of the Miller

Act did not apply to suits brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act and that there was no jurisdiction under the Miller Act on suits brought for materials furnished under the Capehart Act. There was a dissenting opinion.*

QUESTIONS PRESENTED.

May a suit be brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act by a supplier to a subcontractor under the jurisdictional provisions of the Miller Act, 40 U.S.C. § 270 (49 Stat. 794) (12 U.S.C. § 1748, 42 U.S.C. 1594) and is not a military housing project constructed under the Capehart Act (69 Stat. 646, 70 Stat. 1019, 70 Stat. 1109) a public work of the United States within the meaning of the Miller Act?

SPECIFICATIONS OF ERROR.

The Court of Appeals erred in holding that the Miller Act does not give jurisdiction to suits brought on a Capehart Act project bond.

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*Some suggestion is found in the Opinion of the Court of Appeals that the notice given prior to suit was insufficient unless the Miller Act applied. This is not based upon the record. The District Court dismissed the suit solely upon the ground that there was no jurisdiction under the Miller Act. There was no trial and petitioners are prepared to prove at trial that notice was properly given both under the Miller Act and under the bond. This suggestion does not mitigate against the issuance of the writ as the opinion of the Court of Appeals is based upon the ground that the Miller Act does not apply to Capehart bonds.

REASONS FOR GRANTING THE WRIT.

The opinion of the Court of Appeals for the 10th Circuit is in conflict with the decision of the Court of Appeals for the 5th Circuit (and with opinions of District Courts in other Circuits) construing the Capehart Act and the Miller Act and conflicts with the decisions of this Court holding that the Miller Act must be liberally construed to accomplish its purpose of protecting those who furnish labor and material in the performance of contractors for the construction of public works.

As is stated in the opinion of the Court of Appeals, the controlling question is whether or not "the provisions of the Miller Act, 40 U.S.C. § 270 (49 Stat 794) relating to bonds furnished to the United States by contractors engaged in the construction of Federal public works, apply to a suit brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act, 42 U.S.C. § 1594. (69 Stat. 646, 70 Stat. 1019, 70 Stat. 1109)." We submit that the opinion of the United States Court of Appeals holding that no jurisdiction is granted to suits brought on a Capehart Act bond is contrary to the provisions of the Capehart Act and the Miller Act, is contrary to the intent of Congress, as expressed in the Capehart Act, is contrary to the language of the Capehart Act itself, is contrary to decisions of other circuits, and is contrary to the opinions of this Court that the Miller Act must be liberally construed; further, the opinion too narrowly restricts the intent and provisions of the Miller Act.

1. The opinion of the lower court is directly in conflict with the opinion of the United States Court of Appeals for the 5th Circuit in the case of *Lasley* v. *United States*, (5 Cir. 1961) 285 F.2d 98, wherein that court stated:

> "we think it clear that Congress considered that but for the provisions of the Capehart Act, quoted above, a contractor would be required to supply a builder with a Miller Act bond before entering upon a Capehart construction job, because such a project falls within the language 'construction * * * of any public building of public work of the United States'; that the purpose of the bonding provisions in the Capehart Act was merely to substitute it for the bond described in 40 U.S.C.A. §270 (b) quoted above and that the remainder of the provisions of the Miller Act would apply to the Capehart Bond just as they do to a Miller Act bond. This would, of course, include the provisions conferring jurisdiction on the District Courts of the United States."

In addition to the decisions of the United States Court of Appeals for the 5th Circuit, District Courts in the United States in other circuits have held that the Miller Act and the Capehart Act must be construed together and that the Capehart Act bonds are to be treated as having been furnished in lieu of the bonds described in the Miller Act and that the provisions of the Miller Act, including the jurisdictional provisions, apply to suits brought on Capehart Act bonds. *Autrey* v. *William and Dunlap*, (W.D. La. 1960) 185 F. Supp. 802; *United States* v. *Progressive Contractors, Inc.*, (N.E., N.D. 1961) 196 F. Supp. 171; *United States ex rel. Acme Furnace Fitting Company* v. *Fort George G. Meade Defense Housing Corp.*, (D.C. Md., 1960) 186 F. Supp. 639. In this connection, it may be noted that three of the individual defendants are residents of Texas which is in the 5th Circuit. The plaintiff is a Missouri corporation and the North Dakota District Court is in the 8th Circuit which also includes the State of Missouri. It is thus clear that there is a conflict of opinions between the opinion of the Court of Appeals for the 10th Circuit in this case and the opinion of the Court of Ap-

peals for the 5th Circuit as well as a conflict with lower courts in other Circuits. While the precise point raised in the case below includes a suggestion as to the satisfaction of the notice requirements under the Miller Act as opposed to the notice requirements which might otherwise be required and appears to be somewhat different from the jurisdictional point raised in the case of *Lasley* v. *United States* (*supra*), the holding of the two cases are directly contrary to each other in that they decide that the Miller Act either does or does not apply.

2. It would seem clear that the Miller and the Capehart Acts must be construed uniformly throughout the United States and that the question presented is so important that this court should review the opinion below. This court has in the past felt that decisions involving the construction of the Miller Act are such as to call for the review by this court where the lower courts have refused to hold that the Miller Act applied. *U. S.* v. *Irwin*, 316 U.S. 23, 86 L. Ed. 1241, 62 S. Ct. 899; *U. S. ex rel. Sherman* v. *Carter*, 353 U.S. 210, 77 S. Ct. 793; *Clifford F. MacEvoy Company* v. *U. S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 64 S. Ct. 890. Those cases specifically express the policy that the provisions of the Miller Act are to be liberally construed to carry out its purposes while *U. S.* v. *Irwin* (*supra*) states that the Miller Act is meant to control with respect to public works as including "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public". The question whether or not the Miller Act should apply to bonds given under the Capehart Act involves a construction of the Miller Act and this court has in the past felt that the construction of the Miller Act is sufficiently important for this court to review.

3. But not only is the construction of the Miller Act important alone but a construction of the Capehart Act together with the Miller Act is extremely important. The Capehart Act amends Title VIII, "Armed Services Housing the Mortgage Insurance" of the National Housing Act (69 Stat. 646, 70 Stat. 1109) and was to provide the most practical means of coping with a serious housing problem facing our military service. A revolving fund of some $50,000,000.00 and other funds were appropriated and authorized to be transferred for the purposes. Congress "recognized that budgetary considerations would not permit the expenditure in one or two fiscal years of the sums needed to meet the immediate total need" and accordingly provided for "the utilization of private mortgage capital to be repaid from quarters allowances of eligible service personnel". House Report No. 2363, June 15, 1956 (to accompany House Report 11742), 84 Congress, 2nd Session, U.S. Congressional News 1956, 4509, 4506. And Congress in its wisdom decided on a different method of financing the construction of the military housing than outright expenditures. Under the Act, the Federal Housing Administration insures the payment of the mortgages. Eligibility for the insurance requires that the mortgaged property be held by a mortgagor approved by the Commissioner of the F.H.A. who may regulate the capital structure and methods of operation and who also under the Act may acquire stock and interest in the mortgagor. The written contracts for the housing is with the United States of America. In this particular instance, the land was owned by the United States of America and was located in the Fort Riley Military Reservation. Each housing unit constructed was to be placed under the control of the Secretary of Defense and when the housing project is completed the capital stock of the mortgagor is transferred to the Secretary of Defense. The Secretary of Defense is

empowered to purchase land for a Capehart Project. The act states that housing units "shall be deemed to be housing facilities under the jurisdiction of the military department." Under the Act, the mortgages may be guaranteed by the Secretary of Defense. The Attorney General has held that such loan guarantees constitute valid obligations of the United States. (41 Opinions, Attorney General, October 22, 1959) The opinion by Judge Pickett in his dissent stating that "such a project is not in reality one built by a private entity with private funds at private risk", that such a project is a public work and that "in the light of the frequently expressed policy that the provisions of the Miller Act are to be liberally construed to carry out its purpose the Miller Act would apply" indicates clearly, together with the opinion of *Lasley* v. *U. S.* (*supra*), that this is a serious, important question. Further, the 1956 amendment to the Capehart Act which specifically states "the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of Section 1 of the Act of August 24, 1935" (70 Stat. 1110, 42 U.S.C. § 1594) can only mean that the bond shall be deemed a compliance with the requirement for the furnishing of a Miller Act Bond. This clearly shows that the Miller Act does apply to Capehart Act projects and that the only requirement removed from the Miller Act by the Capehart Act is the requirement for *a particular type of bond* and that the Miller Act applies except for a particular type of bond which is required.

CONCLUSION.

Consequently, in view of the conflict of opinions between the circuits, in view of the importance of the question presented and in view of the previous decisions

regarding the Miller Act and the legislative history of the Capehart Act, we respectfully submit that this petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals, Tenth Circuit.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 6916—JUNE TERM, 1962

(Filed United States Court of Appeals, Tenth Circuit, June 15, 1962. Robert B. Cartwright Clerk.)

UNITED STATES OF AMERICA, for the Use and Benefit of MILES LUMBER COMPANY, a corporation, and MILES LUMBER COMPANY, a corporation, in its Individual Capacity, Appellants,

v.

HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a partnership or joint venture, consisting of the following individuals, partnerships, and corporations: Floyd Alfred Harrison, an individual; Joe Bob Harrison, an individual; Five Star Homes, Inc., an Oklahoma Corporation; Lake View Developers, Inc., an Oklahoma corporation; Lorayne, Inc., an Oklahoma corporation; Harrison Builders Supply Company, an Oklahoma corporation; Merit Realty Company, an Oklahoma corporation; Premium Realty Company, an Oklahoma corporation; Floyd A. Harrison Realty Company, Inc., an Oklahoma corporation; Country Club Developers, Inc., an Oklahoma corporation; W. R. Grimshaw Company, an Oklahoma corporation; and W. R. Grimshaw Company, a partnership consisting of William Ray Grimshaw, William Ray Grim-

shaw, Jr., and Harry Douglas Grimshaw; HARDY PLYWOOD AND DOOR, INC., a corporation; TEXOMA DISTRIBUTORS, INC., a corporation; MARSHALL WHOLESALE LUMBER COMPANY, INC., a corporation; CARL MORRIS, an individual doing business as Carl Morris Construction Company; STANDARD ACCIDENT INSURANCE COMPANY, a corporation; NATIONAL SURETY CORPORATION, a corporation; AETNA CASUALTY & SURETY COMPANY, a corporation; NEW AMSTERDAM CASUALTY COMPANY, a corporation; THE TRAVELERS INDEMNITY COMPANY, a corporation; PAUL W. ANDERSON; NATHAN A. BURKHAM; W. G. (Bud) KILLION; MARJORIE ANDERSON; FLORINE BURKHAM; BETTY ANN KILLION; and DANIEL E. HARDY, Appellees.

Appeal from the United States District Court for the District of Kansas

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Robert B. Langworthy (Billy S. Sparks, Weary, Weary & Sangster, and Linde, Thomson, Van Dyke, Fairchild & Langworthy were with him on the brief) for Appellants.

Remington Rogers and F. Philip Kirwan (Rogers & Litchfield, Cantrell, Douglass, Thompson & Wilson, and Margolin & Kirwan were with them on the brief) for Appellees Harrison & Grimshaw Construction Company, Standard Accident Insurance Company, National Surety Corporation, Aetna Casualty & Surety Company, New Amsterdam Casualty Company, and The Travelers Company.

Paul W. Anderson, William Hergenreter, and Garlinghouse, Shaw & Hergenreter submitted a brief on behalf

of Appellees Paul W. Anderson and Marjorie Anderson.
No appearance for any other appellee.

Before PICKETT, LEWIS, and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The issue is whether the provisions of the Miller Act, 40 U.S.C. §§ 270a and 270b, relating to bonds furnished to the United States by contractors engaged in the construction of federal public works, apply to a suit brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act.[1] If the Miller Act controls the notice given prior to suit was sufficient whereas if it does not, that notice was insufficient. The trial court denied the applicability of the Miller Act on the ground that a Capehart Act project was not a public work of the United States and dismissed the first of the 6 counts in the complaint. In so doing the court made the findings required for an interlocutory appeal under 28 U.S.C. § 1292(b) and we allowed the appeal.

Miles Lumber Company (Miles) claims $27,059.66 for lumber furnished to subcontractors on a military housing project at Fort Riley, Kansas, and sues on the prime contractor's payment bond to recover that amount.

The Capehart Act amends Title VIII, "Armed Services Housing Mortgage Insurance," of the National Housing

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1. See 42 U.S.C. §1594 as amended in 1956, 70 Stat. 1109-1110.

Act.[2] The purpose of the amendments was to provide "the most practicable means of coping with the very serious housing problem * * * facing our military services." While conceding the advantages of the use of appropriated funds, Congress "recognized that budgetary considerations would not permit the expenditure in 1 or 2 fiscal years of the sums needed," and accordingly provided for "the utilization of private mortgage capital to be repaid from quarters allowances of eligible service personnel."[3]

The statutory plan calls for construction by private entities with private funds advanced on the security of mortgages covering the housing to be constructed. The Federal Housing Administration insures the payment of the mortgages. Eligibility for such insurance requires that the mortgaged property be held by a mortgagor approved by the Commissioner of the Housing Administration who may regulate the capital structure and methods of operation and may acquire, for not more than $100, stock or interest in the mortgagor.[4]

Each housing unit is placed under the control of the Secretary of Defense "as soon as the unit is available for occupancy as determined by the Commissioner" and when the housing project is completed, the capital stock of the mortgagor, except that held by the Commissioner, is transferred to the Secretary of Defense,[5] who uses ap-

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2. 69 Stat. 646 and 70 Stat. 1109. The pertinent provisions are found at 12 U.S.C. §§1748a-1748i and 42 U.S.C. §§1594, 1594a-1594g.

3. House Report No. 2363, June 15, 1956 [To accompany H.R. 11742], 84th Congress, 2d Session, 3 U.S. Cong. News '56 4509, 4546.

4. 12 U.S.C. §1748b(b)(1).

5. 42 U.S.C. §1594(a).

propriations for quarters allowances to pay the mortgage.

In the situation here presented the mortgagor-builder was Fort Riley C-1 Housing, Inc., a Kansas corporation, and the mortgagee-lender was the First National Bank and Trust Company of Tulsa, Oklahoma. The prime contractor was Harrison and Grimshaw Construction Company. A contract was made with the Department of the Army but that contract appears nowhere in the record and we are not advised of its terms.

A payment bond, executed in the amount of $3,542,050 by the prime contractor and four corporate sureties, was accepted by the United States. The bond named as obligees the mortgagor-builder and the mortgagee-lender. Its condition is prompt payment to claimants for labor and material furnished. A prerequisite to suit on the bond is notice to any two of the following, "the principal, any one of the Obligees, or the Sureties above named" before the expiration of 90 days after the performance of the last work or the supplying of the last material or before the expiration of the time for filing a lien under state law. The bond provides that "either the giving of notice, or the filing of lien, in accordance with the pertinent lien law of the place where the project is located is a sufficient notice." Miles did not give the notice required by the bond.

The Miller Act provides that in order for a supplier of labor and material to a subcontractor to recover in a suit on a payment bond given by a prime contractor that supplier shall give notice of nonpayment to the prime contractor before the expiration of 90 days from the date on which the last labor was performed on, or ma-

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6. 42 U.S.C. §1594b.